Will Judas Turn Your Client Over For Thirty Years of Silver?
Accomplice Testimony - How To Defend Against It.

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In historical context, one of the premier snitches in western civilization is none other than Judas Iscariot. For a mere thirty pieces of silver, he set into motion a significant persecution in western civilization history.

The dynamics of that snitch deal, remarkably, are still played out in criminal prosecutions in modern times. A known, or suspected, collaborator of a government suspect is induced to provide information or testimony for other than altruistic reasons in order to convict the prosecution's choice of the least favored in a class of suspects. Litigation histories reveal that such inducements have been known to include: reduced charges or sentences [1], money [2], improvement in living conditions or even a new identity [3].

Constitutional requirements provide that the snitch, if he or she chooses to testify in court against the prime prosecution target, must face the filter of cross-examination by the accused's counsel.[4] Wide latitude is afforded an accused's counsel in that cross-examination to ferret out the motives, biases or prejudices which may truly be the basis for the testimony inculpating the accused.[5] Often, the accomplice/snitch testimony may be the only factual support for the prosecution's case. Preparing to challenge the accomplice's testimony and test the motives, biases or prejudices may well be the difference between conviction and acquittal for your client.

THE DEAL

Upon discovery or notice that your client will face a testimonial assault by an alleged accomplice/collaborator in a crime, the first task is to discover what the "deal" is between the prosecution and the accomplice. It is rare that an accomplice will open his/her mouth at trial for nothing. Usually a plea agreement is a good starting place to determine the parameters of any "contract" between the accomplice and the prosecution. It may well reveal reduction in charges, dismissal of charges or sentencing considerations that have been afforded the accomplice in exchange for his/her testimony.[6] Further, it may reveal the length of the "contract," e.g., in the event of any retrial, as well as any requirements for the quality of the testimony, e.g., truthful.[7] If an actual plea has occurred, a transcript of the plea proceedings would be helpful to see what the factual basis for the plea was. Did the accomplice relate the facts? The prosecutor? The defense counsel?

An accomplice's testimony is theoretically premised upon the notion that it is and will be truthful. Of course, it would be fair cross-examination, before a jury, to determine the accomplice's understanding as to who determines whether the testimony that is provided is truthful. Does the accomplice decide? Does the court decide? Does the prosecutor decide? Does the jury decide? Or, has it already been determined that the testimony is truthful? And, when and where was that determination made? It is always entertaining to have a snitch explain

his/her understanding of the truth in front of disinterested jurors. Philosophers could not come up with more arcane or esoteric meanings of truth than a snitch.

IMPEACHMENT

Once an accomplice has developed the "truth" on his/her direct examination at trial, it is time for the defendant to test the truth. The resources for impeachment are bountiful.

There may first be the physical evidence. Medical examiner reports, crime scene diagrams, pictures and expert forensic opinions may well be at odds with the version of the truth proffered by an accomplice. Of course, this requires close scrutiny of the accomplice's language and words designed to paint the truth.[8]

An accomplice's prior record, whether it be adult or juvenile, is also grounds for testing his/her credibility.[9] The nature of a conviction may tell much about the accomplice's truth. Police reports which detail prior statements of an accomplice may well reveal the inability of an accomplice to be truthful with police. It is not a leap of logic, or speculation, to question why an accomplice can be truthful to a jury when he/she has a penchant for lying to the police.

Of course, often accomplices have seen the light, or otherwise been rehabilitated, in the errors of their prior ways by the time they testify. They may have had substance abuse counseling, or therapy; perhaps even hypnosis[10] to rectify their past misguidance. Records of such treatment may well aid in impeachment of the accomplices' version of the truth.[11] If prior pre-sentence reports are available, they often contain histories of the accomplices as well as statements of theirs which may contradict their testimony at trial.

Juries often like to focus on the statements of other witnesses who testify at trial, as unbiased witnesses. They may well be witnesses who simply may, or may not, have heard gunshots, or screams or other sounds at the time of the alleged crime. They may have seen individuals with a certain description at the time of the alleged crime. Their testimony can often be at odds with the truth developed by the accomplice.

The preferred, and usually the most effective, method of impeaching an accomplice may be his/her own prior statements, written or oral.[12] Inconsistent ones usually are the most beneficial. But, even consistent ones, with a different twist can be effectively utilized. Their statements can be found in police reports, on audiotapes, videotapes and other methods utilized to preserve statements made to police personnel. Additionally, letters to family of friends, or even co-defendants, can be used.

A true bountiful garden of information may be "free talks" or polygraph examinations. While polygraph results may not be admissible at trial [13], certainly the answers provided during those examinations may be admissible to challenge direct examination testimony. "Free talks" [14] also provide ammunition as the accomplice often will be "puffing" during those talks in order to persuade the authorities that his/her version of the truth is the best one available for sale. It is not uncommon to discover major faux pas in those talks which can directly challenge the accomplice's

ability to be truthful. In a recent case, an accomplice boasted in one such "free talk" that his goal throughout the trial preparation process was to "outfox the prosecutor." An argument was easily made that the accomplice's goal to " outfox the prosecutor" had extended to the objective to "outfox the jury."[15]

INTANGIBLES

While there may be many sources to aid in the cross-examination of an accomplice, all things discovered may prove inadequate when the accomplice takes the oath and sits in the witness chair in the courtroom. It is at this time that instinct and experience must also be used.

The Confrontation Clause also implicates the right to a face-to-face encounter.[16] In most situations the face-to-face encounter has been rehearsed with the prosecutor and the accomplice's attorney. However, the beauty of cross-examination is the spontaneity it allows the examiner in confronting the witness. The accomplice's body-language, facial expressions and nervous gestures should be easily catalogued during the direct examination. When they appear on cross-examination, they should be clues that the accomplice's version of the truth is under stress. Using those clues to present the various forms of impeachment can impact favorably on the impressions of the jurors.

CONCLUSION

Automatically, an accomplice, or immunized witness, is laboring under a credibility handicap. His/her own criminal involvement tarnishes his/her image and the deal received provides the jury with a plausible reason as to why the witness is testifying for the government, possibly even untruthfully. While most accomplices who testify against a co-defendant are advised that honesty is the best policy in answering questions in the witness chair, even a properly prepared witness cannot easily abandon old habits for untruthfulness. With proper research and preparation, an accomplice may be successfully discredited and your client's fate rests entirely on the physical evidence, or lack of it.

Endnotes:

1. *See*, **State v. Towery**, 186 Ariz. 168, 177, 920 P.2d 290, 299 (1996) (accomplice receives reduced murder charge and elimination of death penalty for testimony).

2. *See*, **State v. Dunlap**, 187 Ariz. 441,453, 930 P.2d 518, 531 (Ariz. App. Div. 1 1996) (accomplice testimony motivated by financial gain for family member due to information against others which would result in split of moneys received by investigator retained by those accused by accomplice); *see also*, **State v. Gertz**, 186 Ariz. 38, 42, 918 P.2d 1056,1060 (Ariz. App. Div. 1 1995) (hiring of civil lawyers to proceed against defendant in civil suit admissible to show motive or interest in financial gain by testimony).

3. Various amenities provided by federal law include: documents for new identity;

housing; transportation and moving expenses; living expenses; employment; security systems for protection. *See*, 18 U.S.C. sec. 3521(b)(1) (A) - (I).

4. **Davis v. Alaska**, 415 U.S. 308, 315-316, 94 S.Ct. 1105, 1109-10, 39 L.ED.2d 347 (1974; **State v. Dunlap**, 125 Ariz. 104, 105, 608 P.2d 41,42 (1980) (confrontation clauses of state and federal constitutions require allowance of reasonable cross-examination of defendant's accuser).

5.**Davis v. Alaska**, *supra*; **Pointer v. Texas**, 380 U.S. 400, 403-404, 85 S.Ct. 1065, 1067-68, 13 L.ED.2d 923 (1965); **State v. Correll** 148 Ariz. 468, 473, 715 P.2d 721,726 (1986); **State v. Bracy**, 145 Ariz. 520, 533, 703 P.2d 464, 477 (1985).

6. *See*, Yvette A. Beeman, *Note, Accomplice Testimony Under Contingent Plea Agreements,* 72 Cornell L.Rev, 800,824 (1987).

7. *See*, **State v. Fisher**, 176 Ariz. 69, 859 P.2d 179 (1993) (due process prohibits a plea agreement from conditioning leniency upon anything other than truthful and complete testimony; further, confrontation and cross-examination rights allow challenge to testimony at trial to show testimony given is less than a full and truthful account and thus in breach of agreement with prosecution).

8. A technique for discrediting a witness is to expose inherent improbabilities in his testimony. The improbability may be contained in direct examination or exposed fully in cross-examination. An accomplice's proclivity to paint himself into a corner, or dig himself into a hole, may well damage his credibility immeasurably. *See*, *A Practical Approach to Cross-Examination: Safety First*, 25 UCLA LRev 547, 567 (1978).

9. Rule 609, Ariz. R. Evid.; *see also*, **State v. McKinney**, 185 Ariz. 567, 574, 917 P.2d 1214, 1221 (1996) (may not use juvenile record of witness for general attack on character); **State v. Salazar**, 182 Ariz. 604, 609-610, 898 P.2d 982, 987-988 (Ariz. App. Div. 1 1995) (juvenile probationary status of eyewitnesses at scene of shooting was probative of alleged bias in favor of State); **State v. Ruelas**, 165 Ariz. 326, 332, 798 P.2d 1335, 134 (Ariz. App. Div. 1 1990) (use of juvenile record to attack general credibility, and not to establish bias or motive improper under Rule 609(d)); **State v. Van Den Berg**, 164 Ariz 192, 194, 791 P.2d 1075,1077 (Ariz. App. Div. 1 1990) (juvenile witness probationary status subject to analysis under Rules 609 (d) and 404(b), Ariz. R. Evid.).

10. The fact that a witness has been hypnotized at a time prior to his/her testimony at trial can have preclusive ramifications. Normally, a witness who has been subjected to hypnosis will be permitted to testify with regard to those matters he or she was able to recall and relate prior to hypnosis. However, where the hypnosis was used for investigatory purposes, there must be a showing that the hypnosis procedure was performed in a manner designed to minimize the danger of contamination of both prehypnotic and posthypnotic recall. In the absence of that showing, the witness may be precluded from testifying at trial. *See*, **State v. Lopez**, 181 Ariz. 8, 887 P.2d 538 (1994).

11. *See*, **State ex rel. Romley v. Superior Court**, 172 Ariz. 232 836 P.2d 445 (Ariz. App. Div. 1 1992) (due process requires defendant right to subpoena and obtain medical records, or treatment records where witnesses'/victims' mental state at time of alleged offense will be at issue at time of alleged offense).

12. Rule 613, Ariz. R. Evid.

13. *See*, **United States v. Scheffer**, 523 U.S. 303 ,118 S.Ct. 1261, 140 L.ED.2d 413 (1998) (rules of evidence which exclude polygraph evidence from admission at a trial do not abridge an accused's right to present a defense as long as they are not arbitrary or disproportionate to the purposes they are designed to serve. However, the questions asked and responses given may well be admissible under other rules of evidence, as long as mention of the polygraph setting is precluded).

14. A "free talk" is a situation where, normally, the witness/accomplice, his/her attorney, the prosecutor and a law enforcement representative meet to review the witness's/ accomplice's factual knowledge concerning an offense. The statements made are immunized, to a degree, in that the prosecution agrees not to use such statements, or evidence obtained, against the accomplice in the event no agreement or plea bargain is reached with the witness/accomplice. It is not uncommon for there to be a written agreement setting out the parameters of the agreement or an audio- or videotape recording of the discussion.

15. **State v. Manjarrez**, CR 97- 07689(B), Maricopa County (defendant acquitted of felony-murder charges premised upon testimony of alleged accomplice).

16. **Coy v. Iowa**, 487 U.S. 1012, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988).